(3)

No. 88-1434

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ELIZABETH DOLE, SECRETARY
OF LABOR, ET AL.,

PETITIONERS,

v.

UNITED STEELWORKERS OF AMERICA, ET AL.

RESPONDENTS.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF LAWTON CHILES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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April 3, 1989

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INTEREST OF THE AMICUS CURIAE

As a member of the United States Senate, Amicus Lawton Chiles was the Senate sponsor and an author of the Paperwork Reduction Act of 1980, and the Senate sponsor of amendments to the Act contained in the Paperwork Reduction Reauthorization Act of 1986.

I support the Paperwork Reduction Act. I believe the Third Circuit has fundamentally misread the Act, and misconstrued its statutory scheme.

The Third Circuit opinion holds:

> "In one sense the [OSHA] standard requires chemical manufacturers to collect and transmit information [to other members of the public], and employers to collect and maintain information [for disclosure to other members of the public]. It would be a far-fetched interpretation of the Paperwork Reduction Act of 1980, however, to hold that these activities fell within its coverage." 855 F2d 108, at p. 113.

I respectfully disagree with this holding of the Third Circuit. It is inconsistent with two other Circuit Court opinions.

SUMMARY OF REASONS FOR GRANTING THE PETITION

(1) The Third Circuit opinion ignores the language of the statute and applicable legislative history. The Senate and the House of Representatives explicitly considered whether collection and maintenance of information for disclosure by one private party to another (or to the public as a whole) required by regulation should be subject to the Act, and decided, yes, that it should.

(2) In United States v. Bruce Smith, 866 F2d 1092 (9th Circuit, No. 87-3020, decided January 23, 1989), the Circuit Court reversed criminal convictions because the Forest Service failed to comply with provisions of the Paperwork Reduction Act.

Had the convicted appellants filed the same appeal in the Third Circuit, the result -- based at least on the effusive dicta in the Third Circuit opinion -- would have been different.

DISCUSSION

I. REVIEW IS NECESSARY TO CORRECT A MISREADING OF THE STATUTE AND THE APPLICABLE LEGISLATIVE HISTORY.

It is clear that the Paperwork Reduction Act covers "recordkeeping" (44 U.S.C. 3502(4) and (11)).

We in Congress specifically defined the term "recordkeeping" to mean a "requirement imposed by an agency on persons to maintain specified records." (44 U.S.C. 3502(17)). On its face, this definition contemplates a federally sponsored requirement which entails maintaining information for public, third party, or other disclosure purposes.

The notion that the information maintained must eventually go to or be used

by the government is clearly not implied by the language of this definition. To the contrary, prior to enactment we explained just the opposite. This "definition includes information maintained by persons which may be but is not necessarily provided to a Federal agency." (Senate Committee Report, No. 96-930, 96th Congress, 2nd Session, at p. 40).

Had the Third Circuit reviewed the legislative history behind why Congress specifically defined the term, that court would have discovered explicit consideration of whether regulations which require persons to disclose information to third parties should be covered by the clearance requirements of the Act. Both the House and Senate spoke directly to this precise issue.

The Comptroller General of the United States was the reason. In 1973, the

Congress amended the Federal Reports Act and gave the General Accounting Office (GAO) the clearance authority previously held by the Director of the Office of Management and Budget (OMB) for information collected by the independent regulatory agencies. (Pub. L. 93-153, sec. 409). The Comptroller was frustrated in his efforts to perform his clearance responsibilities because several agencies resisted the GAO's efforts by asserting, among other things, that disclosure requirements to third parties were not covered by the Federal Reports Act definition of "information". (See Federal Reports Act of 1942, 44 U.S.C. Section 3502 (1976)).

In a report to Congress in 1976 the Comptroller commented:

> "Two agencies, the Securities and Exhange Commission (SEC) and the Commodity Futures Trading Commission (CFTC), believe that only a small number of their information-gathering

activities are subject to the Federal Reports Act.

SEC believes that some of its activities involve collection of information subject to 44 U.S.C. 3512, but other SEC responsiblities involve the "disclosure" of information to the public rather than collection activities, and accordingly, are not subject to that provision. The SEC contends that, in contrast to other Government agencies which solicit information for their own purposes, SEC serves as a conduit through which information is disclosed to investors pursuant to Federal securities laws. (Report to the Congress by the Comptroller General of the United States, "Status of GAO's Responsibilities Under the Federal Reports Act", OSP-76-14, May 28, 1976, at p. 15).

> "... The underlying reasons for these agencies' refusal to submit most of their forms to us for clearance are that they believe this would be an intrusion into their regulatory responsibilities. We disagree with the position of SEC and CFTC and are currently working with these agencies to resolve the issue." (Ibid., at p. 16).

The Comptroller recommended the Congress clarify and strengthen the Federal Reports Act "to allow the clearance agency

to challenge the need for regulatory information." (Ibid. at p. 20).

In 1974, the Congress established the Commission on Federal Paperwork. (Pub. L. No. 93-556, 93rd Congress, 88 Stat. 1789). "The legislation was the result of Congressional concern that the Federal Reports Act of 1942 was not effective in limiting the Federal paperwork burden." (See "Legislative History of the Commission on Federal Paperwork," prepared by the Legislative Digest Section, Office of the General Counsel, United States General Accounting Office, at p. iii). Since the Comptroller General and the Director of OMB were statutory members of the Commission, the issue of whether disclosure requirements to third parties should be covered by the clearance process was thrashed out by that body. (See "The Reports Clearance Process", A Report of the

Commission on Federal Paperwork, September 9, 1977, at p. 43).

The Commission on Federal Paperwork noted:

> "The Act is not clear on its coverage of a major portion of the paperwork burden -- recordkeeping requirements -- although recordkeeping is covered in OMB Circular A-40, the primary guideline instruction, as well as other OMB and GAO guidelines...Not all agencies covered by the Federal Reports Act comply fully with its requirements." (Ibid, at p. 1).

"For years, several of the regulatory agencies, particularly the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) held themselves exempt, not always with success, from the reports clearance control of the Bureau of the Budget. The FTC took the position that its law enforcement responsibilities, mandated by the Congress, required the collection of information from business entities and industries which was for it alone to determine. The SEC took a similar position with regard to the information needed in enforcing the disclosure requirements of the securities laws. There were negotiations and discussions from time to time between the OMB and the agencies concerned, not always with clear-cut resolution. Generally, the

> OMB was not inclined to make a head-on confrontation, nor did it have any specified statutory means to enforce compliance. (Ibid., at p.43).

In June of 1978, when I held Senate hearings on efforts to reduce federal paperwork burdens, the Comptroller General brought his views and that of the Paperwork Commissions to my attention. ("Efforts to Reduce Federal Paperwork Burdens", Hearing before the Subcommittee on Federal Spending Practices and Open Government of the Committee on Governmental Affairs, United States Senate, 95th Congress, 2nd Session, June 28, 1978, at page 45). The term "recordkeeping" was incorporated in the definition of "collection of information" in the bill I introduced in June of 1979. (For text of S. 1411, see "Paperwork and Redtape Reduction Act of 1979", Hearing before the Subcommittee on Federal Spending Practicers and Open Government of the

Committee on Governmental Affairs, United States Senate, 96th Congress, 1st Session, hearing of November 1, 1979, at page 89).

Congressmen Brooks and Horton (who was a co-Chairman of the Paperwork Commission) introduced a House companion to S. 1411 in February of 1980. (For text of H.R. 6410, see "Paperwork Reduction Act of 1980", Hearings before a Subcommittee on Government Operations, House of Representatives, 96th Congress, 2nd Session, February 7, 21, and 26, 1980, at p. 3). When the Comptroller General testified before them he noted that their bill included his recommendations to resolve the problems he and the Paperwork Commission had identified with the clearance process.

> "Section 101 of the bill replaces the Federal Reports Act, incorporating five needed changes. First, recordkeeping requirements

> are specifically included in the reports clearance process..." ...
>
> "The Federal Reports Act is presently unclear on whether recordkeeping requirements are subject to clearance. In practice, both GAO and OMB have required that they be cleared. Some agencies, however, have resisted compliance with these efforts." (Ibid., House hearings on H.R. 6410, at p. 39).

The House Committee gathered statements from the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Federal Communications Commission, the Federal Reserve System, and the Securities and Exchange Commission, all of whom raised concerns relating to the proposed changes to the Reports Act. (Ibid., House hearings on H.R. 6410, at p. 313-336).

The SEC had this to say:

> "...This expansion of the scope of the Federal Reports Act is of major concern to us. We do not think the purpose of the Bill is, or should be, to subject the Commission's disclosure and enforcement efforts to oversight by the Office of Management and Budget. We do not believe, for example, that OMB should determine whether

> information about possible selfdealing between corporate officers and the company ought to be disclosed in a proxy statement. The definition of "collection of information" is so broad, however, that it could be read as encompassing this information, which is collected on standard, statutorily authorized forms. (Ibid., at p. 331).

On the Senate side, I held hearings in November of 1979 and invited the SEC and FCC to testify publicly on their concerns, since, among other issues, the Senate bill also incorporated the term recordkeeping in its definition of "collection of information" and "information collection requests". Commissioner Evans of the SEC made the identical point to me. (See Hearings on S. 1411, November 1, 1979, at p. 67). Commissioner Brown of the FCC expressed similar concerns. I responded in part:

> "Senator Chiles. Well, we are delighted to get that best advice and that is the reason for this hearing, to get your concerns about it. ... Yet, when we go out into the countryside, when we go out and listen to people, they do not feel anybody is doing a good job, the Congress, the executive branch, the independent regulatory agencies, or anyone. They are demanding that something be done. So, again, we are talking about weighing something here. We are talking about not wanting to cripple the mission of the independent regulatory agencies nor the mission of the executive agencies like EPA and OSHA and all of the other agencies that are vital to the well-being of this country. But at the same time, we are trying to put some governor on this thirst for information and some rational decisionmaking processes that Congress can review and that the people can hold accountable, and that we can say we are trying to get a handle on. ("Paperwork and Redtape Reduction Act of 1979," Hearings on S. 1411, 96th Congress, 1st Session, November 1, 1979, at p. 87).

The Congress deliberately chose to retain the definition of recordkeeping that had been recommended to it by the Comptroller General and the Paperwork Commission. Both the Senate and House Reports spoke directly to the point of

whether disclosure requirements were to be covered by the Act's requirements.

> [Senate]: "Information is also collected to form the basis for disclosure to the public. For example, documents filed with the Securities and Exchange Commission by issuers of securities and by other persons subject to the Federal securities laws are designed for use by persons making investment and other financial decisions. In this connection, Federally-mandated disclosures to the public by issuers and certain owners of securities are central to carrying out the purposes of the Federal securities laws. Therefore, in considering whether information will have practical utility, the Director should consider, among other things, whether the agency can use the information either to carry out its regulatory or other functions or to make it available to the public for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction.
>
> The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified information. The definition includes information maintained by persons which may be but is not necessarily provided to a Federal agency." ("Paperwork Reduction Act of 1980," Senate

> Report on S. 1411, Senate Rep. No. 96-930, 96th Congress, 2d Session, September 8, 1980, at pages 39-40).
>
> [House]: "...the definition of "collection of information" clarifies an ambiguity as to the types of information collection covered by the Act. The Comptroller General testified that certain interpretations, such as that by the Securities and Exchange Commission, severely limit the scope of the act and the controls over Federal information collection efforts. ("Paperwork Reduction Act of 1980", House Rep. No. 96-835, 96th Congress, 2d Session, March 19, 1980, at p. 19). ...
>
> "The Committee's intent in making the changes in the definition was to clarify the existing definition to force SEC and any others who might apply a restrictive interpretation to comply with statutory information collection clearance requirements. The Committee fully expects SEC to comply with the "more extensive" definition of collection of information contained in H.R. 6410. (Ibid, at p. 23).

II. REVIEW IS NECESSARY TO RECONCILE DIFFERENCES AMONG THE CIRCUITS ON THE FORCE AND EFFECT OF THE PAPERWORK REDUCTION ACT.

The Paperwork Reduction Act, as a re-codification and expansion of the Federal Reports Act of 1942 (44 U.S.C. 3501 et seq., (1976)), is deliberately structured as a coordinated whole, in order to have its various provisions build upon and reinforce each other. Agencies are to justify their need for a recordkeeping requirement and submit their proposal to the Office of Management and Budget. The public is to have early and meaningful opportunity to comment as part of the review process. As the ultimate sanction and public protection, if an agency fails to participate in the statute's review process, or fails to display a current control number, then, "Notwithstanding any other provision of law," the public is not subject "to any penalty for failing to

maintain" information. (Paperwork Reduction Act of 1980, "44 U.S.C. 3512. Public protection.")

In this context, the ruling of the Third Circuit is in conflict with a ruling of the Ninth Circuit in United States v. Smith, 866 F2d 1092 (U.S. Court of Appeals, 9th Cir., No. 87-3020, decided January 23, 1989). In Smith, the Ninth Circuit was faced with determining whether a Forest Service regulation, promulgated pursuant to the agency's statutory mission, entailed an "information collection request" within the meaning of the Paperwork Reduction Act. Judgments of conviction had been entered against the appellants. That Court had to further decide whether Section 3512 of the Act prohibited the judgments of conviction entered against the appellants. The Court ruled the regulation did constitute an information collection request, that it did

not display a current control number as required by section 3512 of the Act, and reversed the convictions.

In acknowledging a statutory scheme underpinning the Paperwork Reduction Act which culminates in the Public Protection section, (44 U.S.C. Sec. 3512), the Ninth Circuit recognized that an agency engaged in enforcing criminal sanctions of its substantive programs was not relieved from its responsibilities under the Paperwork Reduction Act. The Court thereby affirmed a fundamental premise of the Paperwork Reduction Act that every person is entitled to be assured that their government has checked the need for information before it asks them to provide or maintain information.

Certainly, the pursuit of criminal sanctions by an agency "embodies

substantive policy decision making". (See 3rd Cir. opinion 855 F2d at p. 112).

In contrast, the Third Circuit, relying on an isolated reading of two provisions -- 3504(a) and 3518(e) -- and not on the provisions of the Act as a whole, suggests that if an agency activity involving the collection of information also involves substantive policies and programs, it is relieved from its responsibilities under the Paperwork Reduction Act to submit its proposals to the Director and the public for review. (See 3rd Cir. opinion, 855 F2d 108, at p. 113).

To fall outside the scope of the Director's responsibilities is to fall outside the scope of the public protection afforded by section 3512 of the Paperwork Reduction Act. Had appellants in Smith, supra., pled their case in the Third Circuit the result would have been

different. The two Circuits are in conflict on the scope of this basic right afforded by the Paperwork Reduction Act. The Court should review this conflict between the Circuits and uphold the integrity of the Paperwork Reduction Act.

The discussion presented herein with regard to the proper interpretation of the Paperwork Reduction Act applies equally to the issues raised in the pending Petition for Writ of Certiorari in No. 88-1075, Associated Builders and Contractors, Inc. and the Construction Industry Trade Associations v. OSHA.

I also note the opinion of the Third Circuit is in conflict with the ruling of the D.C. Circuit in Action Alliance of Senior Citizens v.Bowen, 846 F.2d 1449 (D.C. Cir. 1988), petition for cert. pending (No. 88-849).

SUMMARY

As I noted when Congress amended the Paperwork Reduction Act in 1986:

> "A fundamental premise of the Paperwork Reduction Act is that every citizen is entitled to have their Government check the need for information requests made of them."
> ...
>
> "The law was intended to be comprehensive in its coverage of federally sponsored "collections of information." Exemptions to this coverage, either by agency or by class of information were specifically set out in the definitions of section 3502 or the savings provisions of section 3518. The notion the law was dedicated primarily to "forms, questionnaires, and surveys" and not to other instruments such as reporting, recordkeeping, and disclosure requirements which are means to carry out federally "sponsored collections of information" is a fundamental misreading of what the law states, what the Congress of 1980 intended, and what this Committee affirms in the amendments of 1986..." (Statement of Sen. Chiles upon Senate passage of the Paperwork Reduction and Reauthorization Act of 1986, Congressional Record, Oct. 16, 1986, at p. 16740).

This Third Circuit opinion interprets the Paperwork Reduction Act in a way

directly contrary to the intent of the Senate and the House of Representatives when they constructed the statute in 1980 and amended it in 1986. The 3rd Circuit opinion is also inconsistent with an interpretation of the Paperwork Reduction Act expressed by the 9th Circuit and the D.C. Circuit.

CONCLUSION

For these reasons, Amicus Lawton Chiles joins the Solicitor General of the United States in requesting the Court grant a Petition for Writ of Certiorari.

Respectfully submitted,

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